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No. 03-1027

Supreme Court, U.S.
FILED
MAR 16 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense,

Petitioner,

vs.

JOSE PADILLA and DONNA R. NEWMAN,
as Next Friend of Jose Padilla,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a federal district court have jurisdiction under 28 U. S. C. § 2241 to hear a habeas corpus petition when neither the prisoner, the immediate custodian, nor anyone in the custodian's chain of command is located within the district at the time the petition is filed?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Although the present case is not a criminal case, it nonetheless involves a vicious, murderous attack on the American

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

people and a continuing conspiracy to commit additional and even more devastating attacks. Facilitation of such attacks by releasing the conspirators is therefore contrary to interests of the law-abiding public that CJLF was formed to protect.

In addition, the procedural mechanism used to accomplish this result, the writ of habeas corpus, is an area of law in which CJLF has developed substantial expertise. We have participated in most of this Court's major cases in this area in the last 15 years, including, among others, *Teague* v. *Lane*, 489 U. S. 288 (1989), *McCleskey* v. *Zant*, 499 U. S. 467 (1991), *Felker* v. *Turpin*, 518 U. S. 651 (1996), and *Williams* v. *Taylor*, 529 U. S. 362 (2000). We believe our expertise in this field will be helpful to the Court. As we are cognizant of this Court's Rule 37.1(a) and aware that many other *amici*, as well as the parties, will thoroughly brief the merits, this brief is limited to the question of habeas jurisdiction.

SUMMARY OF FACTS AND CASE

Al Qaeda, a terrorist organization, has for many years sought to injure the United States and its people by any means within its power. The most infamous such attack was the airplane hijackings of September 11, 2001, which destroyed the World Trade Center, damaged the Pentagon, and killed over 3,000 people in those buildings and on the airplanes. See *Padilla* v. *Bush*, 233 F. Supp. 2d 564, 570 (2002).

Al Qaeda is not finished, but is "committed to and involved in planning further attacks." *Id.*, at 571. The government believes that the habeas petitioner (respondent in this Court), Jose Padilla, also known as Abdullah al Muhajir, plotted with al Qaeda "to build and detonate a 'radiological dispersal device' (also known as a 'dirty bomb') within the United States . . . ." App. to Pet. for Cert. 169a-170a.

Padilla was arrested in Chicago on a material witness warrant issued by the United States District Court for the

Southern District of New York. See 233 F. Supp. 2d, at 568-569. He was removed from Chicago to New York, in the custody of the Justice Department, and counsel was appointed for him. *Id.*, at 571.

While a motion to vacate the warrant was pending, the President designated Padilla an enemy combatant and directed the Secretary of Defense to take him into custody. *Ibid.* He is presently in the Consolidated Naval Brig in Charleston, South Carolina, in the custody of the officer in charge there, Commander M.A. Marr. See *id.*, at 569.

On June 11, 2002, after Padilla's removal to South Carolina, his attorney filed the instant habeas corpus petition in the Southern District of New York. The District Court held that Padilla's attorney had standing to file the petition on his behalf. *Id.*, at 578. The court granted the government's motion to dismiss President Bush, finding he was not a proper party. *Id.*, at 578, 582. The court also dismissed Commander Marr. *Id.*, at 583. However, the court held that Secretary of Defense Rumsfeld was a proper party. *Id.*, at 582.

The District Court held, based on Second Circuit precedent and its interpretation of Supreme Court precedent, that it had territorial jurisdiction of the case simply because the Secretary of Defense was within the reach of New York's "long-arm" statute. *Id.*, at 583-587.

On the merits, the District Court determined that the President has the authority to detain enemy combatants and that the lawfulness of detention in Padilla's case would be determined on the basis of "whether the President had some evidence to support his finding that Padilla was an enemy combatant . . . ." *Id.*, at 610.

Both parties appealed. See *Padilla* v. *Rumsfeld*, 352 F. 3d 695, 702 (CA2 2003) (certification by District Court; grant of interlocutory appeal by Court of Appeals). The Court of Appeals affirmed on the standing, proper respondent, and jurisdictional issues. *Id.*, at 702-710. On the merits, the Court

of Appeals remanded with instructions to order Padilla released from military custody within 30 days. *Id.*, at 724. Judge Wesley dissented from this holding. *Id.*, at 726. This Court granted certiorari on February 20, 2004.

SUMMARY OF ARGUMENT

The phrase "within their respective jurisdictions" in 28 U. S. C. § 2241(a) places a territorial limitation on the habeas jurisdiction of United States District Court. The legislative and judicial history of this phrase had given it a settled meaning at the time Congress enacted the present section in 1948. The authorities are uniform to that time that when neither the petitioner nor the custodian is physically within the district, the district court has no habeas jurisdiction.

Developments since 1948 do not require, or even permit, a different result. Congress has made exceptions to the territorial rule but kept the basic rule intact. Decisions of this Court permitting habeas for future custody or minimally restrictive "custody" have required adjustments but have not abandoned the basic rule of territorial limitation.

Rules expanding extraterritorial jurisdiction in ordinary civil cases do not apply to habeas corpus. This includes Federal Rule of Civil Procedure 4(k)(1)(A), relied on by the Court of Appeals in this case. Under *Harris* v. *Nelson* and other cases, civil rules do not apply to habeas corpus where they are inconsistent with the special rules and statutes governing that unique proceeding. Where civil rules contradict the habeas statute's express limitation on the territorial extent of jurisdiction, the civil rules do not apply.

ARGUMENT

"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*." 28 U. S. C. § 2241(a) (emphasis added). The question of jurisdiction must be answered first. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94-95 (1998). If the answer is negative, the court should not decide the merits. See *id.*, at 109-110.

I. The habeas corpus jurisdiction of the federal district courts is and always has been territorial.

A. The history of "within their respective jurisdictions" to 1948.

The history of Congress's expansion of the substantive scope of federal habeas from the Founding through Reconstruction has been traced many times. See, *e.g.*, Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 33-35 (1965). The present case requires an examination of a different aspect of these statutes, *i.e.*, their territorial limitations.

The First Congress enacted,

> "That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be

brought into court to testify." Judiciary Act of 1789, § 14, ch. 20, 1 Stat. 81-82.

The second sentence placed no express territorial limitation on the district courts, probably because it was understood. "This division and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden." *Ex parte Graham*, 10 F. Cas. 911, 912 (No. 5,657) (CC ED Pa. 1818).

On facts very similar to the present case, habeas relief was denied for lack of jurisdiction in *In re Bickley*, 3 F. Cas. 332 (No. 1,387) (SDNY 1865). Bickley had been in military custody in New York, but he had been moved to Massachusetts before the application was filed. See *id.*, at 333. Neither Bickley nor the immediate custodian was in New York, but the named respondent, the military commander for the entire region, was. See *ibid.* The court held that it had no jurisdiction. See *id.*, at 334.

In 1833, Congress added habeas protection for persons held in state custody for acts enforcing federal law. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634-635. Again, no territorial limitation was expressly stated, or needed to be.

In 1842, Congress added protection for foreigners claiming to have acted under rights conferred by international law. "That either of the justices of the Supreme Court of the United States, or judge of any district court of the United States, *in which a prisoner is confined*, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus . . . ." Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (emphasis added). By this time it was apparently thought necessary to explicitly state the territorial limit.

The largest expansion of habeas jurisdiction is the Reconstruction statute passed in 1867. When the bill reached the Senate, Senator Johnson objected that its broad language would give every district court nationwide jurisdiction. Cong. Globe,

39th Cong., 2d Sess. 730. "I do not see why the authority should not be limited to the circuit judge of the circuit where the party is imprisoned . . . ." *Ibid.* Senator Trumbull, the bill's sponsor, doubted the bill was susceptible of the construction Senator Johnson gave it, but agreed to examine the matter further.

A few days later the bill came up again. Senator Trumbull noted the previous objection that the bill might be misinterpreted such that "a judge in one part of the Union would be authorized to issue a writ of *habeas corpus* to bring before him a person confined in another and a remote part of the Union." *Id.*, at 790. To preclude this misinterpretation, Senator Trumbull proposed an amendment to add the words "within their respective jurisdictions." *Ibid.* Senator Johnson was satisfied that this language "removes [the] difficulty." *Ibid.*

These are two possible interpretations of these various acts. Either Congress intended the territorial scope of habeas jurisdiction to vary among the substantive grounds, or Congress understood all four acts to be equivalent in this regard. That is, "within their respective jurisdictions" in the 1867 act means substantially the same thing as the "in which a prisoner is confined" clause in the 1842 act, and both are consistent with the implicit limitation that was understood in the first two acts. The second interpretation seems the more plausible and it was soon confirmed by Congress itself.

In 1874, Congress enacted the Revised Statutes. "The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873." *United States* v. *Bowen*, 100 U. S. 508, 513 (1880). "It was the declared purpose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions." *Smythe* v. *Fiske*, 23 Wall. (90 U. S.) 374, 382 (1874). The pertinent parts of the four pre-codification habeas statutes were combined into these sections:

"§ 751. The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.

"§ 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

"§ 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The limitation "within their respective jurisdictions" in § 752, taken from the 1867 act, applies to all the substantive grounds, which are combined in § 753. If there is any ambiguity in the phrase, courts look to the original statute and give it the same meaning, "unless a contrary intention is plainly manifested." *United States* v. *Le Bris*, 121 U. S. 278, 280 (1887). Since the phrase applies to the substantive ground from the 1842 act, it should have the same meaning as that act's limitation to the district "in which a prisoner is confined" if that is a plausible interpretation, which it certainly is.

The phrase "within their respective jurisdictions" was uniformly understood to be a territorial limitation on habeas jurisdiction until the next major recodification in 1948. See *Ex parte Kenyon*, 14 F. Cas. 353, 354 (No. 7,720) (CC WD Ark.

1878) ("This, of course, has reference to their territorial jurisdiction"). *In re Boles*, 48 F. 75 (CA8 1891) involved a habeas petition by a prisoner convicted in a territorial court in Oklahoma, which was then within the Eighth Circuit, but who was confined outside the circuit. See *id.*, at 75-76. The court held, "we cannot issue the writ in question to be served in another circuit . . . ." *Id.*, at 76. In *Ex parte Gouyet*, 175 F. 230 (D. Mont. 1909), the court understood the statutory phrase to be an express restriction "to the territorial jurisdiction of the court where the application is made," *id.*, at 233, denying it jurisdiction to grant habeas corpus for a prisoner convicted in that court but confined elsewhere.

In cases where the prisoner and the custodian are both outside the territorial jurisdiction, the cases through 1948 are uniform that there is no jurisdiction. See, *e.g.*, *United States ex rel. Belardi* v. *Day*, 50 F. 2d 816, 817 (CA3 1931); *United States ex rel. Quinn* v. *Hunter*, 162 F. 2d 644, 648-649 (CA7 1947) (temporary presence of both in court was insufficient).

Ahrens v. *Clark*, 335 U. S. 188 (1948) was decided nearly contemporaneously with the enactment of the overhauled Title 28, obviously too late to have had any impact on Congress's drafting of the new habeas law. Even so, the cases cited in it give us a view of what the phrase "within their respective jurisdiction" was understood to mean when Congress decided to reenact it.

Ahrens cites *Bickley*, *Boles*, *Gouyet* and other cases for the "general view" of strict territoriality. See *id.*, at 190. Two cases are cited with a "but see" signal. See *id.*, at 190, n. 1. *Ex parte Fong Yim*, 134 F. 938 (SDNY 1905) is an immigration case. Two children were detained in the Northern District. The immigration officer was in the Southern District, admitted the children were in his custody, and stipulated that they need not be brought into court. The court's decision on jurisdiction is based on this admission and stipulation, see *id.*, at 939, implying a kind of estoppel. *Ex parte Ng Quong Ming*, 135 F. 378,

379 (SDNY 1905) is another decision by the same judge on the same ground.

Two District of Columbia cases are cited with a "cf." signal. *Ahrens*, 335 U. S., at 190. *Sanders* v. *Allen*, 100 F. 2d 717 (CA DC 1938) was a habeas petition by a prisoner convicted in a D.C. court and confined in the "District workhouse at Occoquan," Virginia. *Id.*, at 718. The court held that in these circumstances the presence in the District of Columbia of the correctional officials was sufficient to give jurisdiction. See *id.*, at 719. However, the court reiterated its adherence to the holding of *McGowan* v. *Moody*, 22 App. D. C. 148, 163 (1903), that the presence in the district of the Secretary of the Navy was insufficient to confer jurisdiction to hear a habeas petition by a prisoner in Guam. See *Sanders*, *supra*, at 720. *Tippett* v. *Wood*, 140 F. 2d 689 (CA DC 1944) is not a habeas case at all, but a mandamus action. Jurisdiction is discussed only in the dissent. See *id.*, at 693 (Arnold, J., dissenting).

In *Ex parte Endo*, 323 U. S. 283, 305 (1944), the Court specifically declined to reach the question of whether presence of the person detained within the district at the time of filing is a prerequisite to jurisdiction. The case holds only that the petitioner's removal to another district after filing does not defeat the jurisdiction. See *id.*, at 306. The statements in *Endo* regarding a respondent being within reach of the court's process relate to the actual granting of relief, not the initial acquisition of jurisdiction. See *id.*, at 306-307.

In short, at the time of *Ahrens*, which is also the time of enactment of 28 U. S. C. § 2241, there was universal agreement in the cases that habeas corpus jurisdiction was subject to territorial limits. The majority view was that confinement of the prisoner in the district was a jurisdictional requirement. A handful of cases held that presence of the custodian was sufficient, although some of these seem to be based on a waiver or estoppel theory.

In *Ahrens*, the Court interpreted the phrase "within their respective jurisdictions" in accordance with the majority view, *i.e.*, strictly requiring confinement within the district as a nonwaivable jurisdictional prerequisite. See 335 U. S., at 190, 193. The dissent agreed that these words did impose a territorial limitation on the jurisdiction, but thought the presence of the custodian within the jurisdiction was sufficient. See *id.*, at 202-203, 206 (Rutledge, J., dissenting). The dissent did not question the correctness of the cases denying jurisdiction "where both the custodian and his prisoner are outside the territorial jurisdiction of the court . . . ." *Id.*, at 203. Indeed, the dissent asserted "it is with that class alone, in my opinion, that the phrase 'within their respective jurisdictions' sought to deal." *Id.*, at 204.

On the eve of the enactment of § 2241, then, this Court was unanimous on the meaning of the phrase "within their respective jurisdictions" as applied to cases such as the present case. When neither the custodian nor the place of confinement is within a district court's district, that court has no habeas jurisdiction.

B. The 1948 Code.

1. The habeas statutes.

From the wording of the 1948 revised habeas statutes, there can be little doubt that Congress intended to preserve the rule of territorial habeas jurisdiction. As originally enacted (and "cleaned up" the following year), the first two sections of the habeas chapter read as follows:

"§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*. The order of a circuit judge shall be entered in the records of the

district court of the district *wherein the restraint complained of is had.*

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to *the* district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

"(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

"(5) It is necessary to bring him into court to testify or for trial.

"§ 2242. Application

"Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

"It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has

custody over him and by virtue of what claim or authority, if known.

"It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

"If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application *to the district court of the district in which the applicant is held.*" 62 Stat. 964-965 (emphasis added); 63 Stat. 105 (adding commas in § 2241(b)).

This wording strongly implies the traditional territorial understanding of *Ahrens*. The phrase "within their respective jurisdictions" was uniformly understood to be a territorial limitation, with only minor differences not pertinent here remaining unsettled. See Part I-A, *supra*. Congress "used the same words, and we can only assume it intended them to have the same meaning that courts had already given them." *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992).

The second sentence provides for the order of a circuit judge to be entered "in the records of the district court of the district where the restraint complained of is had." It would be an odd provision to enter the order of a circuit judge in a district court of another circuit.

Subdivision (b) uses the definite article when permitting transfer to "*the* district court having jurisdiction to entertain it." This implies that Congress believed there was only one. The last sentence of § 2242 eliminates any ambiguity as to which district that was. An application to an appellate court or judge must explain why the application is not made "to the district court of the district in which the applicant is held." It would be nonsensical to require such an explanation unless that is the district court with jurisdiction.

The limitation of habeas corpus to the territory of the district has created some practical problems. As these problems have arisen, Congress and this Court have created alternatives

or ways around the problems but have never abandoned the basic rule of territorial jurisdiction. The manner in which these problems have been resolved indicates that territorial jurisdiction remains the rule until Congress decides to change it, and then only to the extent that Congress changes it.

2. Section 2255.

The most obvious and frequent problem was the use of habeas corpus as a collateral attack on criminal judgments by federal prisoners. The problems are discussed at length in *United States* v. *Hayman*, 342 U. S. 205, 210-214 (1952). Congress could have altered the territorial rule for habeas in this situation, but it chose instead to create an entirely new procedure in 28 U. S. C. § 2255. "This is not a habeas corpus proceeding." *Hayman*, *supra*, at 220. Hence, the territorial limitation on habeas recognized in *Ahrens* is simply inapplicable. The fact that Congress would go to the lengths of creating an entirely new non-habeas procedure rather than simply changing the territorial limitation for habeas indicates that Congress was committed to retaining the territorial limitation for habeas as a general rule.

3. The 1966 amendment.

Under the 1948 act, state prisoners still had to file in the district of confinement, even if the district of conviction was elsewhere. In large states with multiple districts, this presented a problem similar to that for federal prisoners before § 2255. In 1966, Congress made the first outright exception to the rule of territorial jurisdiction, adding § 2241(d) to give the district of conviction concurrent jurisdiction. Pub. L. 89-590, 80 Stat. 811. "The legislative history . . . suggests that Congress may have intended to endorse and preserve the territorial rule of *Ahrens* to the extent that it was not altered by those amendments." *Nelson* v. *George*, 399 U. S. 224, 228, n. 5 (1970).

4. The future custody problem.

Additional problems were created by several decisions of this Court expanding the definition of "custody" for the purpose of habeas jurisdiction and expanding the available relief beyond immediate release. *Peyton* v. *Rowe*, 391 U. S. 54, 55 (1968) held that a defendant sentenced to concurrent terms could attack the second sentence on habeas, even though he had not begun to serve that sentence. Under *Peyton*, a grant of habeas relief is, in effect, a declaratory judgment regarding future custody. It may have nothing to do with the present custodian, who may not even be an official of the same state.

The incongruity and inconvenience of litigating future custody in a jurisdiction which has nothing to do with that custody led to a break with the strict *Ahrens* rule in *Braden* v. *30th Judicial Circuit Court*, 410 U. S. 484 (1973). See *id.*, at 493-494 (practical difficulties). *Braden* adopted the view that custodian, not the prisoner, is the focus of the words "within their respective jurisdictions," citing the *Ahrens* dissent. See *id.*, at 495.

There is expansive language in the *Braden* opinion that could be read as going far beyond the theory of the *Ahrens* dissent and abandoning the territorial limit on habeas altogether, extending habeas jurisdiction wherever "long-arm" service of process might reach. See *ibid.*; *id.*, at 500. Given the substantial contrary authority and the absence of any need for such a sweeping holding to decide the case, any such implication should be considered nonbinding dicta. Cf. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 572-573 (1993) (Souter, J., concurring in part and concurring in the judgment). The theory of the *Ahrens* dissent, that the presence of the custodian (or, in this case, would-be future custodian) within the district met the territorial requirement, is sufficient to resolve the case and is consistent with a narrow reading of the opinion.

Congress implicitly endorsed the result in *Braden* when it adopted the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"). See Pub. L. 94-426, § 1, 90 Stat. 1334 (1976). Habeas Rule 2(b) directs that the attorney general of the state be named a respondent in future custody cases.

5. The loose custody problem.

Another problem results from the expansion of habeas corpus to people who are not incarcerated, but rather in "custody" only under a very loose definition of that term. *Wales* v. *Whitney*, 114 U. S. 564, 571-572 (1885) defined custody in terms very similar to the present definition of "seizure." Cf. *California* v. *Hodari D.*, 499 U. S. 621, 626 (1991). *Wales* was overruled in *Hensley* v. *Municipal Court*, 411 U. S. 345, 350, n. 8 (1973), where a defendant released on his own recognizance and subject to very minimal restrictions was held to be in custody. See *id.*, at 354-355 (Rehnquist, J., dissenting). In cases of minimal restraint, there is no immediate custodian in the traditional sense of the person in charge of the institution of confinement. The nominal custodian may be far removed from the location of the petitioner.

In *Schlanger* v. *Seamans*, 401 U. S. 487, 487-488 (1971), an Air Force enlisted man assigned to Moody AFB, Georgia, was granted "permissive temporary duty" to attend Arizona State University at his own expense and not as part of the ROTC program at that campus. He sought release from the military by filing a habeas corpus petition in the District Court in Arizona. See *id.*, at 488. The respondents were the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of the AFROTC program at ASU. The latter was not a proper respondent, as he had no control over the petitioner. See *id.*, at 489.

The *Schlanger* Court noted once again that habeas jurisdiction is limited by the statutory phrase "within their respective jurisdictions." See *ibid.* "The question in the instant case is

whether any custodian, or one in the chain of command, as well as the person detained, *must be in the territorial jurisdiction of the District Court*." *Ibid.* (emphasis added). The answer is yes. *Id.*, at 490-491.

Schlanger is on point and controlling if it is still good law. The Court of Appeals in the present case attempts to read a distinction into the *Schlanger* Court's lack of separate discussion of the Secretary of the Air Force. See *Padilla* v. *Rumsfeld*, 352 F. 3d 695, 706, n. 12 (CA2 2003). The reason for lack of a separate discussion is obvious and does not distinguish the cases. The Court squarely held that the Secretary of the Air Force was not "present" in Arizona for this purpose. *Schlanger*, 401 U. S., at 488-489. The question is whether this holding survives *Strait* v. *Laird*, 406 U. S. 341 (1972).

Strait involved the unusual circumstance where the nominal custodian was the commander of a records center where petitioner had never been. See *id.*, at 342. The petitioner was in California, and all of his face-to-face contacts with the military had been there. See *id.*, at 343-344. *Strait* itself says it does not "abandon *Schlanger*," *id.*, at 343, but rather distinguishes it based on the unusual facts of *Strait*. *Strait* stretched the concept of presence to include a situation where the custodian exercised continuing control in the district through military intermediaries who were physically present in the district. See *id.*, at 345. There is no need to stretch it any further, and it cannot be stretched to cover the present case without overruling *Schlanger*. *Strait* is consistent with the territorial rule that has governed habeas corpus from the beginning: when *neither* the prisoner nor the custodian is physically present in the district, there is no habeas jurisdiction.

II. Long-arm statutes do not change the territorial rule of habeas corpus.

The Court of Appeals believed that jurisdiction in this case was provided by Federal Rule of Civil Procedure 4(k)(1)(A),

authorizing "jurisdiction over the person of a defendant ¶ (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state where the district is located . . . ." See *Padilla* v. *Rumsfeld*, 352 F. 3d 695, 709 (CA2 2003). Preliminarily, we question whether this rule applies even on its face. A federal official is *not* subject to the jurisdiction of any state court regarding the custody of a federal prisoner. See *Ableman* v. *Booth*, 21 How. (62 U. S.) 506, 524 (1859). We need not belabor this point, however, because a simpler and better understood principle precludes the use of this rule in this context.

Schlanger v. *Seamans*, 401 U. S. 487, 488 (1971) considered and rejected the proposition that rules for broadening the venue of ordinary civil actions operate to broaden the territorial jurisdiction in habeas corpus. See *id.*, at 490, n. 4. "Though habeas corpus is technically 'civil,' it is not automatically subject to all the rules governing ordinary civil actions." *Ibid.* (citing *Harris* v. *Nelson*, 394 U. S. 286 (1969)). "Essentially, the proceeding is unique." *Harris*, *supra*, at 294. As originally promulgated, the Civil Rules had "very limited application to habeas proceedings." *Id.*, at 295. Civil Rule 81(a)(2) simply continued the application of civil rules to habeas proceedings to the extent they had been applied before the promulgation of the rules, but not further. *Id.*, at 294. To the extent the Civil Rules introduced procedural innovations, such as broad discovery, they did not apply to habeas. See *id.*, at 295. The *Harris* Court also noted "the unsuitability of applying to habeas corpus provisions which were drafted without reference to its peculiar problems." *Id.*, at 296. Discovery as it exists in federal civil litigation was unsuited, because it would "do violence to the efficient and effective administration of the Great Writ." *Id.*, at 297. Habeas Rule 11 is "intended to conform with the Supreme Court's approach in the *Harris* case." Advisory Committee's Notes on Rules Governing Section 2254 Cases in the United States District Courts Rule 11, 28 U. S. C., p. 479 (2000 ed.).

Harris was applied to Federal Rule of Civil Procedure 60(b) in *Pitchess* v. *Davis*, 421 U. S. 482 (1975) (*per curiam*). A habeas petitioner successfully obtained a new trial, but then sought to preclude a retrial. He asked the Federal District Court to change its judgment from a conditional to an unconditional writ. *Id.*, at 484-485. Under the circumstances, the basis of this claim could not be exhausted in state court until the post-trial appeal. See *id.*, at 488. The Court held that Rule 60(b) could not be used to evade the exhaustion rule. Civil Rule 81(a)(2) precluded use of the Civil Rules in a manner contrary to the habeas statutes. "Since the exhaustion requirement is statutorily codified, even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command." *Id.*, at 489.

Astonishingly, the Court of Appeals simply ignored this well-known and long-established limitation on applying civil rules to habeas corpus. The court noted in a footnote the government's argument that Federal Rule of Civil Procedure 4(k)(1)(A) was "inapplicable in the habeas context," *Padilla*, 352 F. 3d, at 709, n. 18, but it did not discuss or distinguish *Harris*, *Pitchess*, or any other case in this area.

Habeas corpus cases often involve a judicial demand that the executive release a person it considers to be extremely dangerous. At times, it can involve the release of persons the government believes to be a threat to its very existence. "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Abraham Lincoln, Message to a special session of Congress (July 4, 1861), quoted in W. Rehnquist, All the Laws But One: Civil Liberties in Wartime vii (1998); see also *id.*, at 26, 32-39 (background of *Ex parte Merryman*, 17 F. Cas. 144 (No. 9,487) (CC Md. 1861)). There is no reason to believe that Congress intended litigants to have as much leeway in choosing their forum in such cases as it has permitted the Civil Rules to give them in routine suits over torts and contracts. Congress's contrary intention is plain on the face of the statute. It retained the limitation "within their respective jurisdictions," which was

understood at the time of enactment to be a traditional territorial limit.

The Court of Appeals' interpretation, opening habeas jurisdiction to any district where a cabinet secretary has the minimum contacts needed to satisfy *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), see 352 F. 3d, at 709-710, effectively allows a federal prisoner to sue a cabinet-level officer in nearly any district of his choice. We need not speculate whether such an expansive view would lead to shameless forum-shopping or whether a court would permit such a travesty. It has already happened. In *Gherebi* v. *Bush*, 352 F. 3d 1278, 1301-1302 (CA9 2003), stay granted *Bush* v. *Gherebi*, 124 S. Ct. 1197 (2004), the Ninth Circuit upheld habeas jurisdiction in the Central District of California based solely on the presence of military installations there, even though those installations had nothing whatever to do with the case. This holding is irreconcilable with *Schlanger*, which held that the District Court for the District of Arizona had no jurisdiction in habeas over the Secretary of the Air Force, despite the existence of an AFROTC program at Arizona State University, when that program had nothing to do with the petitioner or his case. See *supra*, at 16-17.

Habeas corpus is a unique proceeding, governed by unique rules. Civil rules may be used if, and only if, they are appropriate to the proceeding and do not conflict with the specific habeas rules and statutes. Rule 4(k)(1)(A) and its incorporation of the New York long-arm statute conflict with the territorial jurisdiction limitation of 28 U. S. C. § 2241(a). They are therefore inapplicable.

Neither the prisoner nor the custodian was present in New York on the day this petition was filed. They were both in South Carolina. Jurisdiction was therefore in the District of South Carolina and not in the Southern District of New York.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction.

March, 2004

Respectfully submitted,

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